SILKS DINNER

Monday 3 February 2020

Chief Justice, Mr Attorney, Mr Shadow Attorney, distinguished guests, sister and brother judges, Silks and Silks' partners, what is there to say? After this year's apocalyptic beginning it's almost jarring to find the Law Term starting, as it always does, with the ceremonial sitting to announce the appointment of the new Silks and culminating, as it always does, with this gala, black tie dinner in the modest surrounds of the Court's Public Hall.

The conditions stipulated in the architectural competition for the design of the Court included that, in its siting and form, the building should impart a sense of strength and security, expressing both its symbolic and working functions: the visitor was to be made aware of the rights, privileges and responsibilities of the Australian judicial system. All of this while transitional areas allowed the visitor "a smooth perceptual change from the exterior towards the judicial character of the court rooms within". The school of architecture chosen as best reflecting these powerful, if somewhat elusive themes, was "modern brutalism". Those who know about these things, tell us that the High Court is the finest example of modern brutalism in the southern hemisphere.

And it is only once a year, at the commencement of the Law Term, that for one night the Public Hall is relieved of the obligation of symbolically conveying the security and strength of the exercise of the judicial power of the Commonwealth, in favour of white table cloths, black ties, fine dining and this atmosphere of conviviality. I always think of the whole day as very satisfactory as, I trust, the new Silks do. It speaks of earlier and more gracious times: the Court sits at an hour that enables the Justices and counsel to affect the life of gentle persons. And, putting to one side the Chief Justice, it has to be allowed that today's sitting doesn't impose a great burden on individual Justices. For that matter, in these days in which efficiency and productivity gains are favoured over tradition, the adoption of the "bulk announcement format" ensures that the sitting doesn't impose a significant burden on the new Silks.

In other Australian jurisdictions each Silk has been at least required to personally announce his or her appointment, and to be able to state the full name of the Silk behind whom he or she stands next in order of precedence. This elicits from the Bench what to modern ears can be the enigmatic inquiry "Mr or Ms Smith, as the case may be, do you move?" To this inquiry the correct response is to bow and remain silent. New South Wales practitioners will be familiar with the story of the two newly appointed male Silks who in the early 1990s announced their appointment in the Court of Appeal on an occasion when Gleeson CJ was presiding. Neither was familiar with the practice and when asked by the Chief Justice "Mr X do you

move?" each replied "I do", leading his Honour audibly to say to his colleagues "I think I've just married them".

The history of the practice was recounted by a New South Wales barrister in the winter edition of the 2014 *Bar News*. He sourced the practice in counsel's right to move the court on an unopposed motion in order of precedence save for the last day of the Term when junior counsel were called on first. He characterised it as one of the Bar's restrictive trade practices, observing that it ceased with the coming into operation of the *Judicature Act* in England in 1875. Whatever may have been the position in England, that certainly was not the position in New South Wales. Retired Judge Harry Bell was moved to write to the editor of *Bar News* explaining his understanding of the practice and surprise that it appeared to have ceased. On motions day in the Full Court, now the Court of Appeal, counsel might in an urgent matter, in which no originating process had been filed, move the court in order of precedence. Before coming onto the Bench, the presiding judge worked out the seniority of counsel with the assistance of the *Law Almanac*. When the business of the Court commenced, the Associate called motions generally and, in order of seniority, counsel were asked "do you move?". If counsel's only brief was in a listed matter he would bow and resume his seat silently. If he was briefed in an unlisted matter he was able to immediately move on his affidavit. Those who have appeared before Harry Bell will not be surprised to learn that in 2014 he recalled it was on

14 February 1947 when Ron Austin, a large counsel six feet tall and weighing over 20 stone in the old money, who was briefed in an unlisted motion, on being asked, "Mr Austin 'do you move?'" struggled to his feet and replied "with difficulty, your Honours".

Anyway, along with this Court's decision to open a Twitter account, I expect there will be those who see the adoption of the "bulk announcement format" as evidencing a regrettable downward slide in standards. I suspect Sir Victor Windeyer would have been of that view. Certainly Sir Victor would have had no truck with the notion that giving precedence its due is a form of restrictive trade practice rather than a tradition worth preserving. Not long after his retirement, Sir Victor wrote a scholarly account of the appearance and history of the robes and gowns worn by the Serjeants, their brothers, the judges, and that pushy new order, the Queen's Counsel. I say "robes and gowns" because Sir Victor explained that the terms are not synonymous; "robe" being a subset of the "gown". Dr Johnson defined "robe" as a "gown of State, a dress of dignity". Correctly, "robe" describes the scarlet and the black garb of the judge. This is by way of contrast with the "gown" worn by the Silk. So don't let it all go to your heads, new Silks.

No one, with the possible exception of Dr Bennett, can lay claim to Sir Victor's knowledge of Australian legal history: but that was not what prompted this article. Sir Victor retired in the early 1970s, a time, as some will recall, of considerable social unrest. In

this hot-house atmosphere, there emerged a movement advocating the doing-away with wigs and gowns. Its proponents argued that they only serve to add to the anxiety of parties and witnesses, who are likely to be overawed by the court room setting. Sir Victor, who famously commanded the 2/48 Infantry Battalion at the siege of Tobruk, wasn't having any of it. Tradition and sentiment, he said, have their legitimate place. The disparaging of the dress and the ritual of court proceedings exhibited a vulgarly, fashionable bias. Worse, in the case of one columnist, ignorance was added to vulgar bias. The columnist had described the dress worn by counsel as "medieval" – it sufficed for Sir Victor to dispose of that particular argument by pointing out that counsel's garb is in fact the ordinary dress of the *eighteenth* century.

For those who enjoy Sir Victor's judgments not just for the beauty of the prose but for the perspective that his understanding of our history often lent to his resolution of the issues, it was pleasing to see Sir Anthony Mason, in a foreword to the recently published collection of Sir Victor's papers, placing him second only to Sir Owen Dixon in the pantheon of the great judges of this Court of the last century. And because I respectfully share that view, Sir Victor's conviction in the importance of the maintenance of the traditions of our profession places me in a position of exquisite difficulty. That is because, as I have explained elsewhere, in New South Wales to my certain knowledge, the erosion of at least one of those traditions can be laid squarely at the feet of the admission of

women to the Bar. I speak of the "counsel lift rule" – a simple enough rule of courtesy that required barristers to enter and exit the lifts in Wentworth and Selborne Chambers and latterly the Law Courts Building in strict order of seniority. Ironically it was the senior Silks, the men of Sir Victor's generation, men who would have shared his views about wigs, and gowns and precedence in the motions list, who were responsible for the rule's demise: for a Silk of a certain age it cut too deeply against the grain to allow a woman stand aside for him - even if the woman was a barrister. And so inevitably the counsel lift rule has fallen into desuetude.

And this may not be the only respect in which we women must accept collective responsibility for the fact that the Bars in the Australian jurisdictions have largely ceased to reflect the attitudes and traditions of a lesser English Boys' Public School at the turn of the last century. On that note, it is gratifying to see a healthy number of women among the new appointments. As many are aware, following the tradition established by Mary Gaudron, I always hold drinks for the women Silks, a discriminatory practice for which, to date, Mathew Howard and the ABA have chosen not to take me on. In this more public setting, of course, I am a woke, equal-opportunity, gender-blind Justice and in that capacity I invite you to charge your glasses, be upstanding and join me in a toast to all the new Silks.